IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. MICROSOFT CORPORATION, Defendant.	Civil Action No. 98-1232 (TPJ)
STATE OF NEW YORK *ex rel.* Attorney General DENNIS C. VACCO, *et al.*, Plaintiffs, v. MICROSOFT CORPORATION, Defendant.	Civil Action No. 98-1233 (TPJ) 10/13/98

UNITED STATES' AND PLAINTIFF STATES' MOTION TO PLACE WRITTEN DIRECT TESTIMONY OF WITNESSES TEMPORARILY UNDER SEAL UNTIL THE DAY PRIOR TO THE WITNESS' COURT APPEARANCE, AND MEMORANDUM IN SUPPORT

The United States and plaintiff States move this Court for entry of an Order placing the written direct testimony of plaintiffs' trial witnesses, which are being filed today, under seal until the close of business the day before the witness is anticipated to appear at trial. The temporary sealing of the written testimony until just before such time as the witness otherwise would have appeared for direct examination will advance the public interest in having the trial

unfold in a traditional manner. Entry of the proposed order, moreover, will fully protect the public's right, whether grounded in the First Amendment or common law, to appropriate access to these proceedings.

I. BACKGROUND

On June 12, 1998, this Court, in an effort to streamline the presentation of evidence at the trial of this action, directed that "the parties shall file the direct examinations of their witnesses, with the exception of hostile witnesses, in the form of written declarations." Pretrial Order No. 1, ¶ 12. The Court subsequently ordered the plaintiffs to file those written declarations ("written testimony") prior to trial, and the defendant to file the written testimony of its witnesses shortly before the completion of the plaintiffs' case-in-chief. See Pretrial Order No. 2, ¶¶ 11-12. The plaintiffs' written testimony is being filed with the Court today, October 13, 1998. Trial of this matter is scheduled to begin six days from now, on October 19, 1998.[1] As provided in the Court's Final Pretrial Order, when a witness is called at trial, the witness "shall avow" the written testimony "under oath on the record as he or she is called."

I. ARGUMENT

"Any federal court has the inherent authority to seal its record when, in the exercise of sound discretion, such action is deemed appropriate." Application of Sarkar, 575 F.2d 870, 781

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[1]On October 1, 1998, the plaintiffs received a letter on behalf of several news organizations (attached as Exhibit A). Among other things, the letter advanced the position that the written testimony should "be made available to the press and public contemporaneously with their submission to the Court . . . ." Ex. A at 2. The news organizations based this position on the view that, although they merely substitute for live testimony that would be given at a later date, "[t]he public's right to trial testimony attaches from the time it is filed with the Court." Id. The United States this evening advised counsel for the news organizations of this motion.

(CCPA 1978) (citing Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978) (emphasis in original)). Courts have particularly broad discretion to enter orders that temporarily seal parts of the record in the course of supervising ongoing proceedings. See In re Reporters Committee for Freedom of the Press, 773 F.2d 1325, 1340-41 (D.C. Cir. 1985). This Court should exercise that power here to order that written testimony submitted in lieu of live testimony be placed under seal until the close of business the day before the witness will be called to testify.

1. Placing written testimony under seal until shortly before the witness' court appearance fully comports with the First Amendment and common law right of access to judicial records and proceedings.

As for the First Amendment, it is settled in this circuit that there is no First Amendment right of access to trial exhibits or other material filed with the court during the course of a trial until such time as a judgment is rendered. See In re Reporters Committee for Freedom of the Press, 773 F.2d 1325, 1338-39 (D.C. Cir. 1985). The First Amendment is implicated, therefore, only to the extent that it grants the public a right to attend the trial itself. Making the written testimony available to the public the day before the witness appears fully satisfies this interest. The public would not otherwise hear the witness until the day testimony is given. Providing the written testimony the day before the witness's in-court testimony, therefore, gives the public more timely access to the witness's testimony than would have been the case had the Court elected to conduct direct examination live.

Nor does the replication of the traditional order in which the public observes the trial impair any common law right. Simply put, no common law right of access could attach until

such time as the witness otherwise would have testified. In United States v. McDougal, 103 F.3d 651 (8th Cir. 1996), the court refused to characterize President Clinton's videotaped testimony as the type of material "to which the common law right of public access attaches." Id. at 657. The court reasoned that, "[a]lthough the public had the right to hear and observe the testimony at the time and in the manner it was delivered . . . in the courtroom," the public did not have a common law right to obtain that testimony in a different form. Id. (emphasis added). Indeed, the court explained, its holding furthered the interest of putting "on equal footing" witnesses "who present live in-court testimony" (whose testimony would not be videotaped) and those who appear through other means. Id. Similarly, in this case, publically releasing a witness' direct examination well in advance of the witness' appearance in court would mark a significant departure from the traditional order in which the public receives trial testimon; for this reason alone, access to written testimony when it is filed is not an aspect of the common law right. Cf. Nixon v. Warner Communications, Inc., 435 U.S. 589, 598-99 (1978) (scope of common law right of access informed by traditional practice).

Moreover, the written testimony is not now subject to the public's right of access because, until the witness appears in court to affirm it, it is not part of the trial record. Although each side expects to call at trial each of the witnesses listed on its final list, there is (and can be) no assurance that each will in fact be called. Unless and until a witness is actually called and tendered for cross-examination, the written testimony is not evidence. It is provided to the Court and counsel for the other side for purposes of facilitating preparation for the receipt of the testimony into evidence; but it is not evidence or part of the trial record until the witness avows

it on the stand.

2. The cases cited by the new organizations in their October 1, 1998, letter do not support the existence of the right of access they posit. To the extent those cases rely on a post-judgment First Amendment right to access to judicial records,[2] as explained, this Circuit recognizes no such right. To the extent they rely upon a common law right of access,[3] none deal with written testimony filed, for the convenience of court and counsel and to expedite the proceedings, in advance of the witness' appearance in court. Indeed, to the extent they rest on a common law "right of contemporaneous access," In re Continental Illinois Sec. Litig., 732 F.2d 1302, 1310 (7th Cir. 1984) (emphasis in original), designed to provide the public "a more complete understanding of the judicial system," United States v. Smith, 121 F.3d 140, 155 (3d Cir. 1997) (internal quotations omitted), that right is fully satisfied by preserving for the public the traditional order in which the trial unfolds.

3. The written testimony that is being filed today and on subsequent dates will, if and when the witness is called, substitute for live trial testimony. It performs a valuable function by ensuring that these proceedings are resolved promptly, and appropriate effective relief ordered swiftly. The timing of the filing of the testimony with the Court reflects this purpose. It ensures

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[2]See Exhibit A at 2 (citing In re Continental Illinois Sec. Litig., 732 F.2d 1302, 1310 (7th Cir. 1984) (applying a right of access of "constitutional magnitude")).

[3]See Exhibit A at 2 (citing Leucadia, Inc. v. Applied Extrusion Tech., Inc., 998 F.2d 157, 161 (3d Cir. 1993) (motion to unseal documents in suit already dismissed); FTC v. Standard Fin. Management Corp., 830 F.2d 404, 406-10 (1st Cir. 1987) (motion for access to financial statements considered by court in approving settlement); Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1179 (6th Cir. 1983) (granting, on common law and First Amendment grounds, access to evidence relied upon by the district court in ruling on a challenge to the FTC's issuance of the equivalent of a cease and desist order)).

that both counsel and the court are prepared to proceed expeditiously with in-court examination. Had the Court decided not to use this time-saving measure, the public would not otherwise obtain the contents of the written testimony -- the witness' direct examination -- until the witness appeared in court. The public would experience the trial in the way public trials usually proceed: with opening statements, followed by the testimony of each witness in turn.

Placing the written testimony under seal until the day before the witness testifies thus serves the public interest by ensuring that the public experiences the trial, including the presentation of the evidence, as it otherwise would have unfolded in the courtroom. Cf. United States v. Torres, 602 F. Supp. 1458, 1463 (N.D. Ill. 1985) ("[T]he trial judge must give those who come to the public courtroom full opportunity to see and hear the judicial process as it unfolds during the trial . . . in an orderly and dignified manner."). The release of the written testimony at the close of the day before the witness is called to testify will enable observes to read the direct testimony shortly before the witness' appearance at trial for cross-examination, thus closely simulating the timing of a live trial. Releasing the written testimony in this manner also will ensure that, as in a live trial, the public experiences the testimony as it unfolds, witness by witness.

Finally, this procedures also serves the interest of fairness. Should the parties call any hostile witnesses, as their testimony will not be in the public domain until the day the witness testifies. Releasing the written testimony of non-hostile witnesses contemporaneously with their in-court appearance thus places the testimony of hostile and other witnesses on an "equal footing." United States v. McDougal, 103 F.3d 651, 657 (8th Cir. 1996) (refusal to release

videotaped testimony of deposition witness placed witnesses appearing through deposition and witnesses appearing live "on [an] equal footing" because the latter would not be videotaped), cert. denied, 118 S. Ct. 49 (1997).

III. CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the Court enter the proposed order temporarily placing the written testimony of plaintiffs' witnesses filed with the court under seal.

Respectfully submitted.

DATED: October 13, 1998

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EXHIBIT A

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October 1, 1998

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Re: ***United States v. Microsoft Corp.*****, Case No. 98-1232 (D.D.C.)**
State of New York, et al. v. Microsoft Corp.**, Case No. 98-1233 (D.D.C.)**

Dear Counsel:

We write on behalf of the Associated Press, Bloomberg News, Dow Jones & Co., The New York Times Company, Reuters America Inc., The San Jose Mercury News, The Seattle

Times, The Washington Post, ZDTV, L.L.C., and ZDNet in anticipation of the commencement of trial in the referenced actions on October 15.

As you know, the trial of this case will resolve issues of significant concern to the American people and has, therefore, been the subject of intense public interest since the inception of litigation last Spring. That interest will reach its zenith during the trial itself, a proceeding to which the press and public are afforded broad rights of access by the Constitution, the common law, and the Federal Rules of Civil Procedure. Accordingly, we write at this time to set forth, well in advance of trial, our clients' understanding of the scope of those rights in the context of this case. We know that all parties share the desire to avoid unnecessary motions practice and, in particular, to avoid the necessity of litigation over issues collateral to the trial on the merits. Therefore, and consistent with Local Rule 108(m), we respectfully request that, if any party does not share the understandings set forth below, they communicate their position to us no later than October 5.

First, we note that, pursuant to Pretrial Order No. 2 and the Amended Scheduling Order entered September 14, the plaintiffs are required to file with the Court the direct examinations of their trial witnesses and excerpts of deposition testimony to be offered at trial on or before October 9. The Pretrial Order further provides that defendants' direct examinations of their trial witnesses and excerpts of deposition testimony must be filed with the Court at least five days prior to the time it appears the plaintiffs' case-in-chief will be completed. The public's right of access to such trial testimony attaches from the time it is filed with the Court. *See, e.g., Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*, 998 F.2d 157, 161 (3d Cir. 1993); *FTC v. Standard Fin. Management Corp.*, 830 F.2d 404, 409 (1st Cir. 1987); *In re Continental Illinois Securities Litigation*, 732 F.2d 1302, 1310 (7th Cir. 1984); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1179-81 (6th Cir. 1983). Accordingly, we anticipate that both the direct examinations and deposition excerpts referenced in Pretrial Order No. 2, as amended, will be made available to the press and public contemporaneously with their submission to the Court, commencing no later than October 9.

Second, during the pretrial phase of this litigation, a substantial number of documents filed with the Court, or otherwise produced in discovery, have been designated "Confidential" or "Highly Confidential" pursuant to the Stipulation and Protective Order entered May 27, 1998. If, as appears likely, at least some such documents will be offered in evidence at trial, the public's presumptive right of access will attach to them with special force. *See, e.g., Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 569, 580 n.17 (1980); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d at 1177; *see also* Fed. R. Civ. P. 43(a); Fed. R. Civ. P. 77(b). Accordingly, we anticipate that very few, if any, trial exhibits will properly be submitted under

seal, either in their entirety or in part. At a minimum, we would expect that, if any party seeks such extraordinary treatment of a trial exhibit, the Court will be asked to rule – at the time of its identification as a trial exhibit – whether any portion of such a document may properly be maintained under seal. In that event, we would further expect that the press and public will receive meaningful advance notice and that no party would object to a request by our clients to be heard on the question.

Third, although we fully expect that the entirety of the trial will be held in open court, we cannot discount the possibility that a party may seek to close the courtroom to the press and public during some portion of a witness' examination. Because any such request by a party in a case of this magnitude would be most extraordinary, *see, e.g., Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982), we trust that the press and public will be afforded meaningful advance notice if any party or witness seeks to close the courtroom and that no party would object to a request by our clients to be heard on the question.

We look forward to receiving your response to the matters addressed in this letter on or before October 5. Because trial is scheduled to commence shortly thereafter, we will interpret a lack of response by a party to signify its disagreement with our understandings of the requirements of applicable law. In that event, our clients will promptly move the Court for appropriate relief.

Yours sincerely,

LEVINE PIERSON SULLIVAN & KOCH, L.L.P.

By _____
Lee Levine
Jay Ward Brown

cc: Mark S. Popofsky, Esq.
David Boies, Esq.

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ORDER

Upon consideration of plaintiffs' Motion to Place Written Direct Testimony of Witnesses Temporarily Under Seal Until The Day Prior To The Witness' Court Appearance, it is hereby

ORDERED that the Motion is granted. All written direct testimony of witnesses filed pursuant to Pretrial Orders Nos. 1 and 2 will be filed under seal. Unless further reason for maintaining the declarations under seal is shown, the seal shall be removed from a particular

declaration at the time the office for the Clerk of the Court closes (4:00pm) on the day before the witness in question is expected to testify.

Dated:_____

_____
Thomas Penfield Jackson
United States District Judge